

Commonwealth Schemes for International Cooperation in Criminal Matters



The Commonwealth

Office of Civil and
Criminal Justice Reform

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Introduction

Modes of international cooperation in criminal matters between countries involve a range of formal and informal actions, including the extradition of persons suspected of a crime from one country to another, the undertaking of investigative actions as part of a criminal process in one country at the request of another through mutual legal assistance, and the transfer of sentenced prisoners from one country to another. Many such actions are governed by national legislation and bilateral or multilateral treaties and involve formal diplomatic and/or judicial functions. Others, such as informal law enforcement cooperation, may not be subject to specific legislative frameworks, but are governed by policy and practice, often on the basis of reciprocity or as a prelude to a formal cooperation.

The Commonwealth has a long history of supporting member countries in international cooperation in criminal matters. Just one year after the Commonwealth was itself constituted, it adopted the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth, the London Scheme for Extradition, which became one of the key international instruments dealing with extradition. In 1986, in view of the success of the London Scheme, the Commonwealth adopted two additional schemes for cooperation, the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, the Harare Scheme, and the Scheme for the Transfer of Convicted Offenders within the Commonwealth. The Commonwealth had thus put in place a comprehensive regime for cooperation across member countries.

Developments since then, including advances in technology and communications, as well as the growth of transnational organised crime, have necessitated a number of amendments to these Schemes. In 2005, the Commonwealth further took action to enhance informal cooperation in criminal matters through the establishment of a Framework for the Commonwealth Network of Contact Persons. This Network includes law enforcement officials, prosecutors, and competent authorities involved in modes of international cooperation in criminal matters across all Commonwealth countries.

The Commonwealth Schemes for International Cooperation in Criminal Matters are not model laws in the sense of other legislative models endorsed by Commonwealth Law Ministers. Rather, they represent non-binding and flexible arrangements which provide a constructive and pragmatic approach to mutual co-operation in Commonwealth countries.

Their implementation may, however, often involve the passing of legislation at the national level in order to give effect to the provisions of the Schemes. In this regard, Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters is available to allow for cooperation to the widest extent possible in line with the Harare Scheme.

Background

London Scheme for Extradition

The London Scheme for Extradition was adopted originally in 1966 and has been the subject of amendments and additions over the last years. In particular, at their 1998 meeting, Senior Officials of Commonwealth Law Ministries agreed that the London Scheme was in need of amendment to take account of experience gained since 1990 and developments in global practice, such as those addressed in the United Nations Model Treaty on Extradition. These most recent amendments were adopted by Commonwealth Law Ministers at their meeting held in November 2002 in Kingstown, St Vincent and the Grenadines.

Amendments approved by Law Ministers in 2002, included amendment of the terminology of the Scheme to replace the term "rendition" with extradition and "fugitive offender" with "person sought", to introduce the term "country" as opposed to the "part of the Commonwealth" applying the same definition of country as in the Harare Scheme, and to employ gender-neutral language and modernize the text. Law Ministers also adopted amendments related to double criminality, to offences committed outside the territory of the requesting country, to the seeking of additional information, to the basis for refusing extradition, and to options where extradition is refused on the basis of nationality.

Scheme Relating to Mutual Legal Assistance (Harare Scheme)

The Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth was originally adopted by Commonwealth Law Ministers at their 1986 meeting, held in Harare, Zimbabwe. The Scheme was subsequently revised by Law Ministers in April 1990, November 2002, and October 2005.

In July 2008, Law Ministers, meeting in Edinburgh, requested the Commonwealth Secretariat to undertake a comprehensive review of the Harare Scheme in light of developments in international co-operation.

In December 2008, the text of a first draft of a revised and updated Harare Scheme, which was originally drafted by an Expert Working Group in 2007, and presented to Senior Officials at their Meetings in 2007 and 2008, was sent to all member countries for comments.

The Secretariat proceeded to convene a Working Group Meeting of Senior Officials and Practitioners of Commonwealth countries at Marlborough House, London, in January 2010. Twenty-two countries from all regions of the Commonwealth sent representatives at a high policy-making level to attend the five-day meeting. The Working Group Meeting engaged in wide-ranging and comprehensive discussions on the revised and updated draft Harare Scheme. At the close of the Working Group Meeting, it was determined that the Secretariat should further undertake a drafting exercise to finalise the revised and updated Harare Scheme, taking into account the Meeting's deliberations and conclusions.

In March 2010, the Secretariat convened a Drafting Committee of member countries which had chaired the break-out and plenary sessions of the Working Group Meeting, as well as the United Kingdom, as the host country. The Drafting Committee was tasked to draft and finalise the text of the revised and updated draft Harare Scheme.

The revised Scheme was considered by Law Ministers at their meeting held 11-14 July 2011 in Sydney, Australia. At that meeting, Law Ministers adopted amendments to the Scheme including new provisions as to the interception of telecommunications and postal items; covert electronic surveillance; the use of live video links in the course of investigations and judicial procedures; and asset recovery.

Scheme for the Transfer of Convicted Offenders

The Commonwealth Scheme for the Transfer of Convicted Offenders was originally adopted by Commonwealth Law Ministers at their 1986 meeting, held in Harare, Zimbabwe.

The Scheme was reviewed by Senior Officials of Commonwealth Law Ministries at their meeting in London in June 1989. Senior Officials recommended one change in the text of the Scheme as agreed in Harare, relating to notifications to the Commonwealth Secretary-General of the enactment of national legislation to give effect to the Scheme. This amendment was agreed by Commonwealth Law Ministers at their meeting held 23-27 April 1990, in Christchurch, New Zealand.

Framework for the Commonwealth Network of Contact Persons

Senior Officials of Commonwealth Law Ministries at their meeting held in October 2004 first considered the possibility of creating a Commonwealth Network of Contact Persons, including prosecutors and competent authorities, for effective co-operation in criminal matters across the Commonwealth.

Senior Officials requested the Commonwealth Secretariat to develop a proposal and to consider ways in which the Secretariat could assist small states in this respect through the development of a Commonwealth Network of Contact Persons and by devising programmes that would assist with capacity building and management of the system.

At their meeting held 17-20 October 2005 in Accra, Ghana, Commonwealth Law Ministers welcomed a proposal by Senior Officials concerning a Commonwealth Network of Contact Persons and agreed to its establishment. Law Ministers approved the Network Framework setting out the basic structure and functions of the Network.

The London Scheme for Extradition Within the Commonwealth

Including amendments made by Law Ministers in August 1986, April 1990, and November 2002

1. (1) The general provisions set out in this Scheme will govern the extradition of a person from the Commonwealth country, in which the person is found, to another Commonwealth country, in which the person is accused of an offence.
- (2) Extradition will be precluded by law, or be subject to refusal by the competent executive authority, only in the circumstances mentioned in this Scheme.
- (3) For the purpose of this Scheme a person liable to extradition as mentioned in paragraph (1) is described as a person sought and each of the following areas is described as a separate country:
 - (a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates, and
 - (b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding subparagraph.

Extradition Offences and Dual Criminality Rule

2. (1) A person sought will only be extradited for an extradition offence.
- (2) For the purpose of this Scheme, an extradition offence is an offence however described which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty.
- (3) In determining whether an offence is an offence punishable under the laws of both the requesting and the requested country, it shall not matter whether:
 - (a) the laws of the requesting and requested countries place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
 - (b) under the laws of the requesting and requested countries the elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting country constitute an offence under the laws of the requested country.
- (4) An offence described in paragraph (2) is an extradition offence notwithstanding that the offence:
 - (a) is of a purely fiscal character; or

(b) was committed outside the territory of the requesting country

where extradition for such offences is permitted under the law of the requested country.

Warrants, other than Provisional Warrants

3. (1) A person sought will only be extradited if a warrant for arrest has been issued in the country seeking extradition and either -
 - (a) that warrant is endorsed by a competent judicial authority in the requested country (in which case, the endorsed warrant will be sufficient authority for arrest), or
 - (b) a further warrant for arrest is issued by the competent judicial authority in the requested country, other than a provisional warrant issued in accordance with clause 4.
- (2) The endorsement or issue of a warrant may be made conditional on the competent executive authority having previously issued an order to proceed.

Provisional Warrants

4. (1) Where a person sought is, or is suspected of being, in or on the way to any country but no warrant has been endorsed or issued in accordance with clause 3, the competent judicial authority in the destination country may issue a provisional warrant for arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the extradition offence had been an offence committed within the destination country.
- (2) For the purposes of paragraph 1, information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a person sought may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that person.
- (3) A report of the issue of a provisional warrant, with the information in justification or a certified copy thereof, will be sent to the competent executive authority.
- (4) The competent executive authority who receives the information under paragraph (3) may decide, on the basis of that information and any other information which may have become available, that the person should be discharged, and so order.

Committal Proceedings

5. (1) A person arrested under a warrant endorsed or issued in accordance with clause 3(1), or under a provisional warrant issued in accordance with clause 4, will be brought, as soon as practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the person were charged with an offence committed in the requested country.

- (2) The competent judicial authority will receive any evidence which may be tendered to show that the extradition of the person sought is precluded by law.
- (3) Where a provisional warrant has been issued in accordance with clause 4, but within such reasonable time as the competent judicial authority may fix:
 - (a) a warrant has not been endorsed or issued in accordance with clause 3(1);
or
 - (b) where such endorsement or issue of a warrant has been made conditional on the issuance of an order to proceed, as mentioned in clause 3(2), no such order has been issued,the competent judicial authority will order the person to be discharged.
- (4) Where a warrant has been endorsed or issued in accordance with 3(1) the competent judicial authority may commit the person to prison to await extradition if -
 - (a) such evidence is produced as establishes a prima facie case that the person committed the offence; and
 - (b) extradition is not precluded by lawbut otherwise will order the person to be discharged.
- (5) Where a person sought is committed to prison to await extradition as mentioned in paragraph (4), notice of the fact will be given as soon as possible to the competent executive authority of the country in which committal took place.

Optional Alternative Committal Proceedings

6. (1) Two or more countries may make arrangements under which clause 5(4) will be replaced by paragraphs 2-4 of this clause or by other provisions agreed by the countries involved.
- (2) Where a warrant has been endorsed or issued as mentioned in clause 3(1), the competent judicial authority may commit the person sought to prison to await extradition if -
 - (a) the contents of a record of the case received, whether or not admissible in evidence under the law of the requested country, and any other evidence admissible under the law of the requested country, are sufficient to warrant a trial of the charges for which extradition has been requested; and
 - (b) extradition is not precluded by law,but otherwise will order that the person be discharged.
- (3) The competent judicial authority will receive a record of the case prepared by an investigating authority in the requesting country if it is accompanied by -
 - (a) an affidavit of an officer of the investigating authority stating that the record of the case was prepared by or under the direction of that officer, and that the evidence has been preserved for use in court; and
 - (b) a certificate of the Attorney General of the requesting country that in his or her opinion the record of the case discloses the existence of evidence under the law of the requesting country sufficient to justify a prosecution.
- (4) A record of the case will contain -

- (a) particulars of the description, identity, nationality and, to the extent available, whereabouts of the person sought;
- (b) particulars of each offence or conduct in respect of which extradition is requested, specifying the date and place of commission, the legal definition of the offence and the relevant provisions in the law of the requesting country, including a certified copy of any such definition in the written law of that country;
- (c) the original or a certified copy of any document of process issued in the requesting country against the person sought for extradition;
- (d) a recital of the evidence acquired to support the request for extradition; and
- (e) a certified copy, reproduction or photograph of exhibits or documentary evidence.

Supplementary Information

- 7. (1) If it considers that the material provided in support of a request for extradition is insufficient, the competent authority in the requested country may seek such additional information as it considers necessary from the requesting country, to be provided within such reasonable period of time as it may specify.
- (2) Where a request under paragraph (1) is made after committal proceedings have commenced the competent judicial authority in the requested country may grant an adjournment of the proceedings for such period as that authority may consider reasonable for the material to be furnished, which aggregate period should not exceed 60 days.

Consent Order for Return

- 8. (1) A person sought may waive committal proceedings, and if satisfied that the person sought has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the person sought to prison, or for admission to bail, to await extradition.
- (2) The competent executive authority may thereafter order extradition at any time, notwithstanding the provisions of clause 9.
- (3) The provisions of clause 20 shall apply in relation to a person sought extradited under this clause unless waived by the person.

Return or Discharge by Executive Authority

- 9. After the expiry of 15 days from the date of the committal of a person sought, or, if a writ of habeas corpus or other like process is issued, from the date of the final decision of the competent judicial authority on that application (whichever date is the later), the competent executive authority will order extradition unless it appears to that authority that, in accordance with the provisions set out in this Scheme, extradition is precluded by law or should be refused, in which case that authority will order the discharge of the person.

Discharge by Judicial Authority

10. (1) Where after the expiry of the period mentioned in paragraph (2) a person sought has not been extradited an application to the competent judicial authority may be made by or on behalf of the person for a discharge and if -
 - (a) reasonable notice of the application has been given to the competent executive authority, and
 - (b) sufficient cause for the delay is not shown,the competent judicial authority will order the discharge of the person.
- (2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either -
 - (a) not later than two months from the person's committal to prison, or
 - (b) not later than one month from the date of the order for extradition made in accordance with clause 9.

Habeas Corpus and Review

11. (1) It will be provided that an application may be made by or on behalf of a person sought for a writ of habeas corpus or other like process.
- (2) It will be provided that an application may be made by or on behalf of the government of the requesting country for review of the decision of the competent judicial authority in committal proceedings.

Political Offence Exception

12. (1) (a) The extradition of a person sought will be precluded by law if the competent authority is satisfied that the offence is of a political character;
 - (b) Subparagraph (a) shall not apply to offences established under any multilateral international convention to which the requesting and the requested countries are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.
 - (c) If the competent executive authority is empowered by law to certify that the offence of which a person sought is accused is an offence of a political character, and so certifies in a particular case, the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.
- (2) (a) A country may provide by law that certain acts shall not be held to be offences of a political character including -
 - i. an offence against the life or person of a Head of State or a member of the immediate family of a Head of State or any related offence (i.e. aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit such an offence);
 - ii. an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence as described above;

- iii. murder, or any related offence as described above;
 - iv. an act declared to constitute an offence under a multilateral international convention the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or to prosecute the person sought; or
 - v. any other offence that a country considers appropriate.
- (b) A country may restrict the application of any of the provisions made under subparagraph (b) to a request from a country which has made similar provisions in its laws.
13. (1) The extradition of a person sought also will be precluded by law if -
- (a) it appears to the competent authority that:
 - i. the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
 - ii. that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions.
 - (b) the competent authority is satisfied that by reason of
 - i. the trivial nature of the case, or
 - ii. the accusation against the person sought not having been made in good faith or in the interests of justice, or
 - iii. the passage of time since the commission of the offence, or
 - iv. any other sufficient cause,
 it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment for the person to be extradited or, as the case may be, extradited before the expiry of a period specified by that authority.
 - (c) the competent authority is satisfied that the person sought has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence for which extradition is sought.

Discretionary Basis for Refusal of Extradition

14. (1) A request for extradition may be refused in the discretion of the competent authority of the requested country if -
- (a) judgment in the requesting country has been rendered in circumstances where the accused was not present; and
 - i. no counsel appeared for the accused; or
 - ii. counsel instructed and acting on behalf of the accused was not permitted to participate in the proceedings;

- (b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances;
- (c) the person sought has, under the law of either the requesting [or requested] country become immune from prosecution or punishment because of [any reason, including] lapse of time or amnesty;
- (d) the offence is an offence only under military law or a law relating to military obligations.

Optional Discretionary Grounds of Refusal

15. (1) Any country may adopt the provisions of this clause but, where they are adopted, any other country may in relation to the first country reserve its position as to whether it will give effect to the other clauses of the Scheme or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 23(a).
- (2) A request for extradition may be refused if the competent authority of the requested country determines -
- (a) that upon extradition, the person is likely to suffer the death penalty for the extradition offence and that offence is not punishable by death in the requested country; and
 - (b) it would be, having regard to all the circumstances of the case and to the likelihood that the person would be immune from punishment if not extradited, unjust or oppressive or too severe a punishment for extradition to proceed.
 - (c) In determining under subparagraph (a), whether a person would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting country may make with regard to the possibility that the death penalty, if imposed, will not be carried out.
- (3) (a) A request for extradition may be refused on the basis that the person sought is a national or permanent resident of the requested country.
- (b) For the purpose of subparagraph (a), a person shall be treated as a national of a country that is -
- i. a Commonwealth country of which he or she is a citizen; or
 - ii. a country or territory his or her connection with which determines national status.
- (c) The assessment under subparagraph (b) should be at the date of the request.

Alternative Measures in the Case of Refusal

16. (1) For the purpose of ensuring that a Commonwealth country cannot be used as a haven from justice, each country which reserves the right to refuse to extradite nationals or permanent residents in accordance

with clause 15 paragraph (3), will take, subject to its constitution, such legislative action and other steps as may be necessary or expedient in the circumstances to facilitate the trial or punishment of a person whose extradition is refused on that ground.

- (2) The legislative action necessary to give effect to paragraph (1) may include –
- (a) providing that the case be submitted to the competent authorities of the requested country for prosecution;
 - (b) permitting:
 - i. the temporary extradition of the person to stand trial in the requesting country on condition that, following trial and sentence, the person is returned to the requested country to serve his or her sentence; and
 - ii. the transfer of convicted offenders; or
 - (c) enabling a request to be made to the relevant authorities in the requesting country for the provision to the requested country of such evidence and other information as would enable the authorities of the requested country to prosecute the person for the offence.

Competent Authority

17. (1) The competent authorities for the purpose of clauses 12, 13, 14 and 15 will include
- (a) any judicial authority which hears or is competent to hear an application described in clause 11, and
 - (b) the executive authority responsible for orders for extradition.
- (2) It will be sufficient compliance with subparagraphs 12, 13, 14 and 15 if a country decides that the competent authority for those purposes is exclusively the judicial authority or the executive authority.

Postponement of Extradition And Temporary Transfer of Prisoners to Stand Trial

18. (1) Subject to the following provisions of this clause, where a person sought –
- (a) has been charged with an offence that may be tried by a court in the requested country or
 - (b) is serving a sentence imposed by a court in the requested country,
- then until discharge (by acquittal, the expiration or remission of sentence, or otherwise) extradition will either be precluded by law or be subject to refusal by the competent executive authority as the law of the requested country may provide.
- (2) Subject to the provisions of this Scheme, a prisoner serving such a sentence who is also a person sought may, at the discretion of the competent executive authority of the requested country, be extradited temporarily to the requesting country to enable proceedings to be brought against the prisoner in relation to the extradition offence on such conditions as are agreed between the respective countries.

Priority Where Two or More Requests Made

19. (1) Where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests.
- (2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular -
 - (a) the relative seriousness of the offences,
 - (b) the relative dates on which the requests were made, and
 - (c) the citizenship or other national status and ordinary residence of the person sought.

Specialty Rule

20. (1) This clause relates to a person sought who has been extradited from one country to another, so long as the person has not had a reasonable opportunity of leaving the second mentioned country.
- (2) In the case of a person sought to whom this clause relates, detention or trial in the requesting country for any offence committed prior to extradition (other than the one for which the person was extradited or any lesser offence proved by the facts on which extradition was based), without the consent of the requested country, will be precluded by law.
- (3) When considering a request for consent under paragraph (2) the executive authority of the requested country may seek such particulars as it may require in order that it may be satisfied that the request is otherwise consistent with the principles of this Scheme.
- (4) Consent under paragraph (2) shall not be unreasonably withheld but where, in the opinion of the requested country, it appears that, on the facts known to the requesting country at the time of the original request for extradition, application should have been made in respect of such offences at that time, that may constitute a sufficient basis for refusal of consent.
- (5) The requesting country shall not extradite a person sought who has been surrendered to that country pursuant to a request for extradition, to a third country for an offence committed prior to extradition, without the consent of the requested country.
- (6) In considering a request under paragraph (5) the requested country may seek the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.
- (7) Nothing in this clause shall prevent a court in the requesting country from taking into account any other offence, whether an extradition offence or not under this Scheme, for the purpose of passing sentence on a person convicted of an offence for which he or she was surrendered, where the person consents.

Return of Escaped Prisoners

21. (1) In the case of a person who -
- (a) has been convicted of an extradition offence by a court in any country and is unlawfully at large before the expiry of the sentence for that offence, and
 - (b) is found in another country,
- the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern extradition to the country in which the person was convicted.
- (2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence for which there is a conviction and, in particular -
- (a) any reference to a person sought shall be construed as including a reference to such a person as is mentioned in paragraph (1); and
 - (b) the reference in clause 5(4) to evidence that establishes a prima facie case shall be construed as a reference to such evidence as establishes that the person has been convicted.
- (3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

Ancillary Provisions

22. Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate -
- (a) the transit through its territory of a person sought who is being extradited under this Scheme;
 - (b) the delivery of property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and
 - (c) the proof of warrants, certificates of conviction, depositions and other documents.

Alternative Arrangements and Modifications

23. Nothing in this Scheme shall prevent -
- (a) the making of arrangements between Commonwealth countries for further or alternative provision for extradition, or
 - (b) the application of the Scheme with modifications by one country in relation to another which has not brought the Scheme fully into effect.

Revised Scheme Relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth

including amendments made by Law Ministers in April 1990, November 2002, October 2005 and July 2011

(With commentaries)

Part I

General Provisions

Paragraph 1: Purpose And Scope

- (1) The purpose of this Scheme is to encourage and enable countries to co-operate with each other to the widest extent possible for the purposes of criminal matters in accordance with this Scheme and their respective domestic laws.¹
- (2) This Scheme provides for the giving of assistance by one country ("the requested country") in respect of criminal matters arising in another country ("the requesting country").²
- (3) The Scheme does not affect any existing forms of co-operation, either formal or informal, nor does it preclude the development of any future forms of co-operation.
- (4) Countries are encouraged to adopt such legislative or other measures as may be necessary to implement the provisions of this Scheme.
- (5) Mutual legal assistance in criminal matters under this Scheme includes, but is not limited to, assistance in:³
 - (a) identifying and locating persons;
 - (b) taking evidence or statements from persons;
 - (c) effecting service of documents;
 - (d) executing searches and seizures;

1 The opening subparagraph of the Revised Harare Scheme (RHS) reflects the need for wider co-operation in criminal matters within the Commonwealth, as expressed by Law Ministers.

2 Subparagraph 1(2) of the RHS, unlike the equivalent provision in the Harare Scheme (HS), makes no reference to the authority responsible for the giving of assistance, to accommodate the varied and differing roles of judicial, governmental and executive authorities across the Commonwealth, in the provision of mutual legal assistance. Nevertheless, it remains a core requirement of the Scheme that each country designates a Central Authority and that communication between countries takes place primarily between Central Authorities.

3 Subparagraph 1(5) of the RHS sets out in outline the general scope of the Scheme, although the list of items is not exhaustive.

- (e) providing and producing relevant documents, records, items and other material;
- (f) facilitating the voluntary attendance of persons in the requesting country;
- (g) effecting a temporary transfer of persons in custody to assist in an investigation or appear as a witness;
- (h) the identification, tracing, freezing, restraining, forfeiture and confiscation of proceeds and instrumentalities of crime;
- (i) the return and disposal of property;
- (j) obtaining and preserving computer data;
- (k) interception of postal items;
- (l) interception of telecommunications; and
- (m) covert electronic surveillance.

Paragraph 2: Interpretation And Definitions⁴

- (1) For the purposes of this Scheme, each of the following is a separate country, that is to say:
 - (a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and
 - (b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding subparagraph.
- (2) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such proceedings could be so instituted.⁵

- (3) For the purposes of this Scheme, the following definitions shall apply:

Central Authority means an authority or authorities designated under paragraph 3;

computer data means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;

content data means the substance of a communication, or the message or information being conveyed by a telecommunication, whether or not any interpretation, process, mechanism or device needs to be applied or used to make the meaning of the communication, or the message or information intelligible;

⁴ Paragraph (2) of the RHS is important in establishing the terminology to be used in the rest of the RHS. The definition of "country" and "criminal matter" in subparagraphs 2(1) and 2(2) of the RHS remain largely unchanged from the HS.

⁵ Subparagraph 2(2) determines the stage at which it becomes possible to seek assistance. It provides that the RHS can be invoked either where proceedings have been instituted or, at the investigative stage, where there is reasonable cause to believe that an offence in respect of which proceedings could be instituted had been committed. The term "proceedings" is further defined in the Scheme to cover criminal and forfeiture proceedings.

covert electronic surveillance⁶ means covert surveillance carried out by or with an electronic surveillance device which transmits, records or otherwise captures audio product, visual images or location or position information, but does not include covert surveillance using a device designed primarily for the interception of telecommunications;

criminal matter means criminal proceedings as well as investigations or proceedings relating to:

- (a) the restraint or freezing of property that may be confiscated or forfeited by a court, or that may be needed to satisfy a pecuniary penalty imposed in respect of an offence;
- (b) the confiscation or forfeiture of property by a court in respect of an offence; and
- (c) the imposition or recovery of a pecuniary penalty in respect of an offence;

criminal proceedings, in relation to an offence, means:

- (a) a trial of a person for the offence; or
- (b) any proceeding to determine whether any person should be tried for an offence;

dual criminality means conduct which would constitute an offence under the laws of both the requesting and requested countries;

instrumentalities of crime means any property used, or intended to be used, in connection with the commission of an offence;

intercept material any document, record or recording obtained by a country as a result of the interception of telecommunications conducted pursuant to the laws of that country, save where the interception was authorised for the purposes of complying with a request under paragraph 22 of this Scheme;

interception of telecommunications means listen to, record or acquire a communication conveyed by means of telecommunications either:

- (a) between its point of origin and its point of destination while it is in transit; or
- (b) contemporaneously with the communication's transmission at the point of origin or its reception at the point of destination;

For greater certainty, the interception of telecommunications includes the content data and may also include any available transmission data.

offence, in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof;

postal item means any letter, package, or other item which is being or will be carried by a postal service;

postal service means any service, whether public or private, which:

⁶ It is important to note that "covert electronic surveillance" is defined in relation to a "device". Consequently, cell site data (information which is used by the service provider to locate and identify the phone for communication purposes) does not fall within the definition, but can instead be obtained retrospectively where the data has already been stored, pursuant to paragraph 20, Preservation of Computer Data, or within the "interception of transmission data" if obtained in real time.

- (a) consists of one or more of the following: the collection, sorting, conveyance, distribution and delivery of postal items; and
- (b) is offered or provided for the purpose of making available or facilitating a means of transmission of postal items from place to place;

preservation of computer data means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate;

proceeds of crime includes any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission;

property means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and includes legal documents or instruments evidencing title to, or interest in, such assets;

stored communication means the content data which is no longer in the course of transmission and which has been stored in a form allowing retrieval;

subscriber information⁷ means any information held by the service provider relating to the name, address, telephone number, e-mail address, Internet Protocol address or any similar identifier associated with a subscriber to any telecommunications service;

telecommunications means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;

transmission data means data that:

- (a) relates to the telecommunication functions of dialing, routing, addressing or signaling;
- (b) is transmitted to identify, activate or configure a device, including a computer program, in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
- (c) does not reveal the substance, meaning or purpose of the communication.

Paragraph 3: Central Authorities

- (1) Each country shall designate a Central Authority for the purposes of this Scheme.⁸

⁷ The definition of "telecommunications" is intended to cover a process (of emission, transmission or reception), rather than that which is conveyed by the process.

⁸ The Scheme follows international practice in this area, as also reflected by the HS, in making it mandatory that each country designates a Central Authority as the primary contact point. Although the request must be transmitted from Central Authority to Central Authority, the Scheme does not prevent responses to the request being made directly to the agency or authority initiating the request to accommodate the differing roles for judicial, governmental and executive authorities in different countries in the provision of assistance in criminal matters.

- (2) The tasks of a Central Authority may include:⁹
 - (a) making, receiving and transmitting requests for assistance and executing or arranging for the execution of such requests;
 - (b) where necessary, certifying or authenticating, or arranging for the certification and authentication of, any documents or other material supplied in response to a request for assistance; and
 - (c) taking practical measures to facilitate the expeditious execution and transmission of requests for assistance.
- (3) For the purposes of this Scheme, communication shall take place directly between Central Authorities unless the countries have agreed otherwise.
- (4) Countries shall promptly notify the Commonwealth Secretariat of their designated Central Authorities and any changes thereto.¹⁰
- (5) The Commonwealth Secretariat shall maintain an updated database of such Central Authorities, and make the database available to all countries.

Paragraph 4: Contents And Form Of Request For Assistance

- (1) A request under the Scheme shall, to the extent possible:¹¹
 - (a) specify the agency or authority initiating the request;
 - (b) specify the nature of the assistance requested;
 - (c) specify the purpose for which the assistance is sought;
 - (d) establish a link between the criminal matter and the assistance sought;
 - (e) specify the details of any particular procedure that the requesting country wishes to be followed;
 - (f) indicate any time limit within which compliance with the request is desired, stating reasons;
 - (g) specify the nature of the criminal matter, and whether or not criminal proceedings have been instituted;
 - (h) where criminal proceedings have not been instituted, state the offence which the requesting country has reasonable cause to believe has been, is being or will be committed, with a summary of known facts;

9 The primary tasks of the Central Authority of the requesting country are set out at subparagraph 3(2) of the RHS. Subparagraph 5(2) of the RHS further requires that the Central Authority satisfies itself that the request can properly be made under the Scheme and that all necessary information has been provided.

10 Subparagraphs 3(4) and 3(5) are added to ensure that countries notify the Commonwealth Secretariat of their designated Central Authorities and any changes thereto. The RHS further requires the Secretariat to maintain and make available an updated database of the Central Authorities within the Commonwealth.

11 Paragraph 4 of the RHS reproduces paragraph 14 of the HS by setting out the contents and form of the request. Given the diverse practice in the Commonwealth, it was not deemed appropriate to provide a template of a letter of request, as a further annex to the RHS. Nevertheless, this provision sets out, in a systematic way, the information which in most circumstances will be required. It is also important to note that the information specified at subparagraph 4 (1) (a), (b), (c), (d), (g), (h) and (i) of the RHS are basic information that must be submitted in every request. It is important to note that all requests ought to contain information regarding the possible penalties for the offence in question.

- (i) where criminal proceedings have been instituted, contain the following information:
 - i. the court exercising jurisdiction in the proceedings;
 - ii. the identity of the accused person;
 - iii. the offence(s) of which the person stands accused, and a summary of the facts and the penalties which may be imposed;
 - iv. the stage reached in the proceedings; and
 - v. any date fixed for further stages in the proceedings.
- (2) Requests shall be in writing unless otherwise agreed and in the language required by the requested country.
- (3) Where further information is required before a request under this Scheme can be executed, such information shall, in so far as practicable, be provided by the requesting country within any deadlines set by the requested country.

Paragraph 5: Execution Of Requests¹²

- (1) The requested country shall, subject to its domestic laws, take all reasonable steps to ensure that the request is complied with expeditiously.¹³
- (2) The Central Authority of the requested country shall promptly inform the Central Authority, or other authority as agreed, of the requesting country, giving reasons as appropriate, where it considers that:
 - (a) the request does not comply with the provisions of this Scheme;
 - (b) the request for assistance is to be refused in whole or in part;
 - (c) the request cannot be complied with, in whole or in part; or
 - (d) there are circumstances which are likely to cause a significant delay in complying with the request.
- (3) The requested country may postpone a decision to execute a request in whole or in part where the immediate execution of the request would interfere with an ongoing investigation or prosecution in the requested country.¹⁴

Paragraph 6: Applicable Law

All requests under this Scheme shall be dealt with according to the law of the requested country.¹⁵

12 Paragraph 5 of the RHS replaces paragraph 7 of the HS, 'Action in the Requested Country'. Subparagraph 7(1) of the HS was considered redundant, given that the requested country can only act according to its domestic law.

13 Subparagraph 5(1) of the RHS reaffirms the obligation on the requested country to take all reasonable steps to ensure that the request is complied with.

14 Subparagraph 5(3) of the RHS allows the requested country to postpone a decision to execute a request in whole or in part, where the immediate execution of the request would interfere with an ongoing investigation or prosecution in the requested country.

15 Paragraph 6 of the RHS underscores the general principle in mutual assistance in criminal matters that the laws of the requesting country govern the execution of the request. To be sure, the provision covers both substantive law (e.g. grounds of refusal which may not be set out in the Scheme) and procedural law applicable to the execution of the request. It is important to note, in this regard, that subparagraph 4(1)(e) of the RHS allows the requesting country to specify the details of formalities and procedure that it wishes, where admissibility of evidence gathered in the requested country requires such formalities and procedures to be adhered to.

Paragraph 7: Costs

- (1) The costs of executing a request shall be borne by the requested country, unless otherwise agreed by the countries.¹⁶
- (2) Where expenses of a substantial or extraordinary nature are or will be required to execute the request, the countries shall consult in advance to determine the manner in which the costs shall be borne.¹⁷
- (3) For the purposes of subparagraph (2), substantial or extraordinary expenses may include but are not limited to:¹⁸
 - (a) fees and reasonable expenses of expert witnesses;
 - (b) the costs incurred pursuant to paragraph 15;
 - (c) the costs of temporarily transferring persons in custody pursuant to paragraph 16;
 - (d) the costs of establishing and operating live video links or other audiovisual means, and the interpretation and transcription of such proceedings;
 - (e) the costs incurred for the interception of telecommunication; and
 - (f) the costs incurred for conducting surveillance.

Part II

Grounds for Refusal

Paragraph 8: General

- (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme where the Central Authority of that country considers that:¹⁹
 - (a) the request relates to an offence or proceedings of a political character;²⁰
 - (b) the conduct which is the subject of the request is an offence only under military law or a law relating to military obligations of the requesting country;

¹⁶ This provision reaffirms the general principle that the costs of executing requests will be borne by the requested country in most cases, as is the practice in the HS and other mutual legal assistance instruments.

¹⁷ Under the HS, it is for the requesting country to meet the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, the fees of experts, and the costs of any translation. However, paragraph 7 of the RHS provides countries some flexibility to agree on an alternative arrangement.

¹⁸ Subparagraph 7(3) sets out the types of expenses that can properly be regarded as "of substantial or extraordinary nature". These include the costs of establishing and operating live video links or other audiovisual means, and the costs of interpretation and transcription of such proceedings, the costs incurred for the interception of communications and the costs incurred for conducting surveillance. However, the list is not exhaustive and is left to states to determine. Reference can also be made to the Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters as adopted by Law Ministers in 1999, especially in view of the concerns of various small jurisdictions on the costs associated with the provision of assistance.

¹⁹ Paragraph 8 of the RHS sets out the circumstances in which compliance with the request may be refused either in whole or in part. All the grounds of refusal under the HS are repeated, except for the "dual criminality", to mirror recent international practice to render assistance in the absence of dual criminality.

²⁰ A request for assistance may be refused where the offence or the proceedings are regarded as having a political character. The double reference to "offence" and proceedings indicates that the formal definition of the offence charged is not necessarily determinative. In determining whether an offence is of political character, subparagraph 8(2) of the RHS requires countries to adhere to the developments in international conventions.

- (c) the request relates to an offence, the prosecution of which in the requesting country would be incompatible with the requested country's law on double jeopardy;²¹
 - (d) compliance with the request would be contrary to the constitutions or domestic laws of that country, or would prejudice the sovereignty, national security, international relations, national interests, public order or other essential public interest of that country;²²
 - (e) there are substantial grounds to believe that compliance with the request would facilitate the prosecution or punishment of any person on account of race, ethnic origin, sex, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request;²³
 - (f) the steps required to be taken in order to comply with the request cannot under the law of that country be taken;²⁴ and
 - (g) by reason of the trivial nature of the alleged offending or the low value of the likely penalty or any property likely to be forfeited or confiscated, the requested country would not have made a similar request to another country in connection with a like criminal matter arising in the requested country.²⁵
- (2) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which deems the offence not to be one of a political character or imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.
 - (3) Assistance shall not be refused solely on the ground of bank or other financial institution secrecy rules.
 - (4) A request made pursuant to Part VI may be refused where the property to be recovered is of *de minimis* value.

21 Subparagraph 8(1)(c) of the RHS deals with situations of double jeopardy, that is, where proceedings would have already been brought in the requested country against the person for the commission of the same offence that forms the subject of the request. This principle is relevant whether the original proceedings resulted in a conviction or an acquittal. Similar to the HS, the requested country is empowered, but not required, to refuse compliance with the request on the basis of double jeopardy. There may be circumstances, for example, where an acquittal was recorded because a key prosecution witness was in the requesting country. In this situation, the provision of assistance may be judged appropriate.

22 Subparagraph 8(1)(d) of the RHS concerns aspects of public policy and the general interests of the country.

23 Subparagraph 8(1)(e) of the RHS further adds ethnic origins and sex to the grounds set out in subparagraph 8(2)(b) of the HS. It is noted that in the context of anti-discrimination laws, it is more common to use the terms 'sex discrimination' than 'gender discrimination'. In addition, the United Nations Model Treaty on Mutual Assistance in Criminal Matters uses the word 'sex'.

24 This provision reflects the general principle that procedures and facilities available in support of criminal investigations and prosecutions initiated in one country should also be made available to other countries. The requested country is not, however, required to do more than it would do in a purely domestic case.

25 It was proposed that this provision be added to allow countries to refuse *de minimis* requests, given the concerns of a number of Central Authorities over their capacity to deal with a growing number of requests for assistance involving offences that might be characterised as "minor" in nature or that had occurred in the distant past. The proposal also ensures that countries are not required to devote resources to assistance in matters which they would regard as too trivial to merit investigation or prosecution if they arose domestically.

Paragraph 9: Imposition of Conditions by Requested Country²⁶

- (1) The requested country may make the provision of assistance subject to the requesting country complying with specified conditions.
- (2) If the requesting country refuses to comply with the conditions, the requested country may refuse to grant the assistance sought in whole or in part.

Paragraph 10: Dual Criminality²⁷

Each country is encouraged to render assistance in the absence of dual criminality.

Paragraph 11: Reciprocity

Each country is encouraged to render assistance in the absence of reciprocal arrangement.

Part III

Requests For Certain Forms Of Assistance

Paragraph 12: Service Of Documents

- (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.²⁸
- (2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (3) The Central Authority of the requested country shall endeavour to have the documents served:
 - (a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or
 - (b) by any other method prescribed by the law of that country for the service of documents in criminal proceedings.
- (4) The requested country shall transmit to the Central Authority of the requesting country a certificate or other proof as to the service of the documents or, if they have not been served, the reasons which have prevented service.

²⁶ Paragraph 9 of the RHS reproduces the principles reflected in subparagraph 7(4) of the HS which allow the requested country to make the granting of assistance subject to the requesting country giving certain undertakings.

²⁷ Paragraphs 10 and 11 reflect the recognition that strict requirements of dual criminality and reciprocity often hinder international co-operation in bringing criminal offenders to justice and that the international trend is to limit or abolish them where possible. These provisions are also in line with the spirit of the purpose of the Scheme, which is to encourage and enable countries to co-operate with each other to the widest extent possible for the purposes of criminal matters.

²⁸ Paragraph 12 of the RHS finds its origins in paragraph 17 of the HS. In early drafts of paragraph 17 of the HS, the provision was limited to judicial documents (original process, subpoenas, judgments), but a wider formulation was eventually accepted to include any document of which service is required under the procedural rules of the requesting country. Paragraph 12 extends the scope of the provision so that it also applies to any documents which relate to the criminal matter, including the civil recovery of assets.

- (5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.²⁹
- (6) Documents which are intended to be served on persons in the requested country may, with the prior consent of the Central Authority of the requested country, be transmitted directly to persons who are present in the requested country.³⁰

Paragraph 13: Provision Or Production Of Documents, Records, Items Or Other Material

- (1) A request under this Scheme may seek the provision or production of any document, record, item or other material relevant to a criminal matter arising in the requesting country.³¹
- (2) The requested country is encouraged to provide copies of any document, record, item or other material not publicly available, to the same extent and under the same conditions as apply to the provision of such material to its own law enforcement agencies or prosecution or judicial authorities.³²

Paragraph 14: Taking Statements Or Evidence From Persons

- (1) A request under this Scheme may seek assistance in taking statements or hearing evidence from persons in the requested country.³³

29 The provision constitutes a recognition that it would not be appropriate for countries to penalise a witness for refusing to comply with a summons served on them while they were outside the jurisdiction of that country. This is in conformity with established principles of national sovereignty and extraterritorial jurisdiction. It is important to remember that such a proposed witness may not be guilty of any wrongdoing and may have no connection with the requesting country; moreover, if the witness does not wish to travel to the requesting country other measures to obtain the evidence are available under the Scheme. If the witness later enters the requesting country, it is then open to the country to serve a further summons on the witness which would be enforceable in the usual way.

30 Early drafts of paragraph 12 of the RHS also sought to add to paragraph 17 of the HS by further allowing countries to send documents directly to a person who is present in the territory of the requested country, provided that the address of that person is known. The RHS allows direct transmission subject to a necessary safeguard requiring the requesting country to first obtain the consent of the Central Authority of the requested country.

31 Paragraph 13 of the RHS finds its origins in paragraph 22 of the HS. However, unlike paragraph 22 of the HS, paragraph 13 of the RHS is not only limited to the production of judicial or official records, relevant to a criminal matter, such as judgments, orders and decision of the courts, other documents held by judicial authorities, government departments or agencies or prosecution authorities.

32 The wording of paragraph 13(2) underscores the principle that the assistance afforded by the requested country to the requesting country should be the same as is available to the requested country had the criminal matter arisen within its jurisdiction. Nevertheless there are sufficient safeguards in the Scheme, such as the provisions on confidentiality, the possibility to impose conditions as well as the overall discretion to refuse assistance. In addition, the wording has the effect of narrowing the scope of assistance, especially where the laws of the requested country may be silent on the matter, but assistance can nevertheless be forthcoming under some form of international agreement.

33 It is noted that paragraph 15 is intended to encompass all forms of witness evidence, including statements, affidavits, depositions and testimony in other countries by live link. Although giving evidence by telephone link is not specifically provided for by the Scheme, the paragraph would also cover any such request. The paragraph could also in principle apply to a requirement for a person to attend court to produce documents under the laws of some countries. To be sure, its equivalent provision under the HS, paragraph 18 on 'Examination of Witnesses' does not appear to be limited to examination of witnesses in court. Subparagraph 18(2) of the HS suggests that the examination can also take place at the investigation stage.

- (2) In addition to the information required by paragraph 4, a request under this paragraph shall also specify³⁴:
 - (a) the name, address or official designation of the person;
 - (b) the status of the person in the investigation or proceedings in the requesting country;
 - (c) any law of the requesting country as to privilege or exemption from giving evidence which may be relevant to the request; and
 - (d) whether the request is for the person to give a statement or evidence in the course of judicial proceedings through live video link or other audiovisual means.
- (3) Where the request is for the person to be questioned other than in the course of judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances of the case permit³⁵:
 - (a) the questions to be put to the person or the subject matter about which the person is to be questioned;
 - (b) whether the person is to provide a written statement;
 - (c) whether the person is to take an oath or make a solemn affirmation;
 - (d) any requirement of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country;
 - (e) whether any official of the requesting country wishes to be present and to participate in the execution of the request;³⁶
- (4) Where the request is for a person to give evidence in judicial proceedings through live video link or other audiovisual means, the request shall also specify so far as the circumstances permit the requirements in subparagraph (3) above, and the following shall also apply³⁷:

34 Subparagraph 14(2) contains matters to be specified in any such request under this paragraph in either case.

35 Subparagraph 14(3) sets out the remaining matters to be specified in a request. Again, the provision that the request should specify whether the evidence is to be provided orally or in writing and to specify any requirement as to the manner of taking evidence permits a country to request evidence in statement form. It should be observed that any request for the accused or his representative to attend would necessarily be subject to the immigration laws of the requested country, and that if the admission of the accused into the requested country was thought undesirable, this could be refused as contrary to the national interests of the requested country under paragraph 8 (1) (d).

36 It is noted that officials of the requesting country typically have no jurisdiction in the requested country. Nothing in the Scheme is intended to undermine this principle, which is a matter for the domestic law of countries. However, it may in some circumstances be appropriate for officials of the requesting country to participate in taking evidence, for example by asking questions directly under the supervision of officials of the requested country for the purposes of taking a statement. The Scheme does not provide for any right to do so as this is a matter for agreement between countries, but it makes provision for the wishes of the requesting country to be communicated in order to make the position clear and give guidance on the contents of a request.

37 Where a witness gives evidence by means of live video link while present in the requested country, he is nevertheless participating in a hearing which takes place in the requesting country. Accordingly, subparagraph 2(b) provides that the hearing is conducted directly by the court (or other judicial authority) of the requesting country. It follows that the procedure is that of the requesting country, although the hearing must not contravene the law of the requested country. There is no requirement that the judicial authorities or any other representative of the requested country be present when the person is heard although subparagraph 3 provides that if they are present, they must make a record of the hearing available to the requesting country.

- (a) measures for the protection of the person to be heard shall be agreed, where necessary, between the requesting and requested countries;
 - (b) the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting country to the extent that it does not contravene the law of the requested country;
 - (c) where the requesting country or the person to be heard so requests, the requested country shall ensure, in so far as possible, that the person to be heard is assisted by an interpreter, if necessary; and
 - (d) without prejudice to any measures agreed for the protection of the person, where a judicial authority of the requested country is present during the hearing, that judicial authority shall at the conclusion of the hearing ensure that there is a record available to the requesting country indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons in the requested country participating in the hearing, and any oath or affirmation made.
- (5) The person from whom a statement or evidence is sought shall be entitled to claim any right not to make a statement or to give evidence which would accrue to that person under the law of either the requested or the requesting country.
- (6) Each country shall take the necessary measures to ensure that, where witnesses are being heard within its territory through live video link or other audiovisual means from requested countries and refuse to give evidence when under an obligation to do so or do not give evidence according to the truth, its domestic law applies in the same way as if the hearing took place in a domestic court and was subject to domestic procedure.

Paragraph 15: Voluntary Attendance Of Persons In The Requesting Country

- (1) A request under this Scheme may seek assistance in facilitating the personal attendance of a person for the purposes of an investigation or to appear as a witness before a court exercising jurisdiction in the requesting country.³⁸
- (2) In addition to the information required by paragraph 4, the request shall also specify:
 - (a) the subject matter relevant to the person's attendance;³⁹
 - (b) the reasons why the personal attendance of the person is required;

38 Paragraph 16 of the RHS aims to facilitate the attendance of a person in the requesting country to assist in an investigation or appear as a witness in proceedings. Paragraph 16 goes beyond its equivalent provision in the HS, paragraph 25, which is limited to the voluntary attendance of witnesses before a court exercising jurisdiction in the requesting country, in view of the overall aim of increasing the scope of assistance in the RHS.

39 The Harare Scheme, which provided for the voluntary attendance of persons to appear as witnesses, required specification of the subject matter upon which it is desired to examine the witnesses. The provision now also encompasses appearance for the purposes of an investigation. The provision has therefore been broadened. Although paragraph 4 requires that the nature of the criminal matter must be specified, paragraph 16 additionally requires that the subject matter relevant to the person's attendance be specified, so that the person is in a position to make an informed decision whether to attend voluntarily to assist in an investigation.

- (c) where appropriate, that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for;⁴⁰
 - (d) where appropriate, details of the travelling, accommodation, subsistence and other expenses payable by the requesting country in respect of the personal attendance of the person; and
 - (e) the effect and consequences of the person's consent, including the person's rights and obligations.
- (3) The requested country shall notify a person whose attendance in the requesting country is desired and, if the person is willing to attend, assist in facilitating the person's attendance to the extent possible.⁴¹
- (4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.⁴²

Paragraph 16: Personal Attendance Of Persons In Custody⁴³

- (1) A request under this Scheme may seek the temporary transfer of a person in custody in the requested country for purposes of an investigation or to appear as a witness before a court exercising jurisdiction in the requesting country.
- (2) In addition to the information required by paragraph 4, the request shall also specify:
 - (a) the subject matter relevant to the person's attendance;
 - (b) the reasons why the person is required;

40 Subparagraph 15(2)(c) of the RHS requires, where appropriate, confirmation that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for. The request for information does not, however, extend to providing the details of the actual arrangements for the person's security.

41 To be sure, the requesting country usually holds the primary responsibility for making arrangements for the attendance of persons in its territory.

42 Subparagraph 15(4) of the RHS reproduces subparagraph 25(4) of the HS, which was added at Christchurch in 1990, to ensure that refusal to appear attracted no penalties. The effects and consequences of a person's consent, including their rights and obligations, may vary from country to country and case to case. However, it is important that information about the domestic provisions which ensure that a witness's rights under the paragraphs relating to immunity and privilege should be provided so that the requested country and witness are clear as to the extent of the protections. Additionally, it may be appropriate to make clear other rights and obligations such as whether the witness will be subject to any compulsion if he withdraws consent after arriving in the requesting country.

43 Paragraph 16 of the RHS contains the more elaborate provisions required to deal with the transfer of persons in custody to appear as witnesses. While the equivalent provision in the HS (paragraph 26) is limited to the temporary transfer of a person in custody in the requested country for purposes of an investigation, paragraph 16 of the RHS also extends to the temporary transfer of a person in custody in the requested country for purposes of an investigation. However, the personal attendance of persons in custody in the requesting country should only be requested where absolutely necessary, especially in the context of an investigation. If a foreign agency wishes to interview a person in custody in another country, subject to the consent of that country, it is encouraged to send officers to that country rather than seek the transfer of that person to its country. It is noted that certain countries only allow for transfer of "sentenced" persons who are in custody, thus excluding the transfer of persons in pre-trial detention. In addition, some countries will not allow the transfer of young persons serving a custodial sentence regardless of whether the young person consents to the transfer. It follows that requests to these countries for the transfer of such persons would be rejected.

- (c) where appropriate, confirmation that arrangements have been made to ensure the person's security whilst travelling to and from the requesting country and while the person is in the requesting country;⁴⁴
 - (d) where appropriate, details of travelling and other expenses payable by the requesting country in respect of the person's attendance;
 - (e) the effect and consequences of the person's consent; and
 - (f) that the person will be lawfully confined, and subject to all the laws and rules applicable, in the requesting country.⁴⁵
- (3) The requested country shall only execute the request for the transfer of the person in custody where the person in custody consents in writing to the transfer.
 - (4) Notwithstanding the consent of the person in custody, the requested country may refuse to comply with a request for that person's transfer and shall be under no obligation to inform the requesting country of the reasons for such refusal.⁴⁶
 - (5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.
 - (6) Where a person in custody is transferred, the requested country shall notify the requesting country of the date, and of any variation thereto:⁴⁷
 - a. upon which the person is due under the law of the requested country to be released from custody; and
 - b. by which the requested country requires the return of the person.
 - (7) The requesting country shall keep the person transferred in custody, and shall return the person to the requested country when the presence of the person in the requesting country is no longer required, and in any case by the earlier of the dates notified under subparagraph (6) above.
 - (8) The obligation to return the person transferred shall continue notwithstanding the fact that the person is a national of the requesting country.
 - (9) The period during which the person transferred is in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.
 - (10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned have agreed to such release.

44 Subparagraph 16(2)(c) of the RHS also requires, where appropriate, confirmation that arrangements for the person's security whilst travelling to and from the requesting country and while the person is in the requesting country have been provided for. The request for information does not, however, extend to providing the details of the actual arrangements for the person's security.

45 The provision is worded so as not to limit the flexibility of the requesting country to place persons in an appropriate location other than a prison, provided the person remains under lawful custody.

46 Pursuant to subparagraph 16(3) of the RHS, the prisoner cannot be transferred if he does not consent. Even where the person does consent, the requested country may, pursuant to subparagraph 16(4) of the RHS, exercise discretion and refuse to comply with the request, without giving any reasons. Subparagraph 16(5) of the RHS reaffirms that no penalty attaches to a refusal by the person in custody to agree to a transfer.

47 Subparagraphs 16(6) and (7) of the RHS ensure that the person will not remain in custody after the expiry of his sentence. Subparagraph 16(8) is designed to ensure that a person transferred cannot, by reason of his possessing citizenship of the requesting country, prevent his return in due course to the requested country.

Paragraph 17: Immunity Of Persons⁴⁸

- (1) A person attending the requesting country in response to a request under:
 - (a) paragraph 15 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions occurring before the time of the departure of the person from the requested country; or
 - (b) paragraph 16 shall be immune in that country from prosecution in respect of criminal acts, omissions or convictions occurring before the time of the departure of the person from the requested country.
- (2) The immunity provided for in those paragraphs shall cease:
 - (a) in the case of a person attending the requesting country in response to a request under paragraph 15, when the person having had, for a period of 15 consecutive days from the dates when the person was notified by the requesting country that the person's presence was no longer required in relation to the criminal matter, an opportunity of leaving has nevertheless remained in the requesting country, or having left that country has returned to it; or
 - (b) in the case of a person who has been transferred in response to a request under paragraph 15 and remains in custody, when the person is returned to the requested country.

Paragraph 18: Privilege⁴⁹

- (1) In response to a request under this Scheme, no person shall be compelled to give any evidence in the requested country which a witness could not be compelled to give:
 - (a) in criminal proceedings in that country; or
 - (b) in criminal proceedings in the requesting country.
- (2) For the purposes of this paragraph, any reference to giving evidence includes references to answering any question and to producing any document, record, item or other material relevant to a criminal matter.

⁴⁸ Paragraph 17 of the RHS, like paragraph 27 of the HS, confers on witnesses appearing in response to a request under the Scheme immunity from prosecution in respect of acts or omissions before the date on which they left the requested country and from detention in respect of convictions recorded before that date.

⁴⁹ Paragraph 18 of the RHS replicates paragraph 21 of the HS, subject to minor drafting changes. Paragraph 18 follows other international instruments in allowing claims of privilege by reference to the laws of both the requesting and requested countries. Subparagraph 14(2)(f) further requires that a request for assistance in the examination of a witness should specify any provisions of the law of the requesting country relating to privilege or exemption from giving evidence which appear especially relevant to the request. In the end, it will be for the courts in the requesting country to rule on any claim affecting the admissibility of evidence.

Paragraph 19: Search And Seizure

- (1) A request under this Scheme may seek assistance in the search for, and seizure of property, including documents, records, items or other material relevant to a criminal matter in the requested country.⁵⁰
- (2) In addition to the information required by paragraph 4, the request shall also specify the property, including documents, records, items or other material relevant to a criminal matter, to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorisation to effect the search and seizure.⁵¹
- (3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of the seizure, and the subsequent custody of the property, including documents, records, items or other material relevant to a criminal matter seized.

Paragraph 20: Requests For The Interception Of Postal Items

- (1) A request under this Scheme may seek assistance for the interception of a postal item during the course of its carriage by a postal service and subsequent transmission to the requesting country of the postal item or where appropriate a copy or record thereof.
- (2) The request may only be made where:
 - (a) it appears to the requesting country that there are grounds to suspect that the information obtained pursuant to this interception will be relevant to the commission of a criminal offence in the requesting country;
 - (b) the criminal matter arising in the requesting country is, in the view of the requesting country of a serious character; and
 - (c) it appears to the requested country that there are grounds to suspect that the information obtained pursuant to this interception will be relevant to the commission of a criminal offence in the requested country.
- (3) Investigative activities undertaken pursuant to this paragraph shall take place insofar as they are permissible under the domestic law of the requested country and the duration and the detailed conditions of such activities shall be agreed between the requesting and requested countries.
- (4) Without prejudice to the general grounds of refusal in Part II of this Scheme, the requested country may refuse a request for assistance under this paragraph and shall be under no obligation to inform the requesting country of the reasons for such refusal.

50 Paragraph 19 of the RHS replicates paragraph 19 of the HS, but removes the reference to computer data, which is now covered by the term "property". "Property", for the purposes of the Scheme, is further defined as assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and includes legal documents or instruments evidencing title to, or interest in, such assets. Paragraph 19 of the RHS also makes it clear that property will include documents, records, items or other material relevant to a criminal matter. It is important to recall in this context the basic principle that any action under paragraph 19 of the RHS, including measures of compulsion, will be governed by the laws of the requested country. This provision is also subject to the general provisions on cost.

51 Subparagraph 19(2) of the RHS refers expressly to the question of warrants or authorisations. The requesting country must provide all available information which might be required in order to obtain the necessary warrant or authorisation to effect the search and seizure. The requested country, having complied with a request, must give any certification needed by the requesting country as to the circumstances of search and seizure and the subsequent custody of the property seized to ensure the admissibility of the resulting evidence.

Paragraph 21: Preservation Of Computer Data

- (1) A request for the preservation of computer data under this paragraph made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requesting country.⁵²
- (2) A request may be made pursuant to subparagraph (1) where it appears to the requesting agency or authority that there are grounds to suspect⁵³ that the preserved computer data may contain information relevant to criminal activities in the requested country.
- (3) In addition to the information required by paragraph 4 of this Scheme, a request for the preservation of computer data shall include:
 - (a) the identity of the agency or authority making the request;
 - (b) a brief description of the conduct under investigation;
 - (c) the identity of the individual whose computer data is to be preserved, or that person's telecommunications address;
 - (d) a statement that the requesting country intends to submit a request under this Scheme to obtain the computer data within the period specified in subparagraph (4)(a); and
 - (e) a description of the computer data to be preserved and its relevance to the investigation or prosecution.⁵⁴
- (4) The preservation of computer data pursuant to a request made under this paragraph shall be for a period of one hundred and twenty (120) days.
- (5) Notwithstanding the general grounds for refusal contained in paragraph 9, a request for the preservation of computer data under this paragraph may be refused only to the extent that it appears to the requested country that compliance would be contrary to its laws and/or constitution, or would prejudice its security, international relations, or other essential public interests.
- (6) If the requested country considers that the preservation of computer data pursuant to a request made under this paragraph will not ensure the future availability of the computer data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting country, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.

⁵² Subparagraph 20(1) aims to ensure that requests for preservation of computer data can be made and fulfilled in an expeditious manner, given that it may be particularly volatile. This is ensured, where domestic law permits, by removing the need to communicate with Central Authorities at this stage. Central Authorities are only brought in subsequently when requests to obtain the preserved information are effected.

⁵³ Given that the content of communications could be preserved pursuant to this paragraph, subparagraph 20(2) requires, as a measure to increase privacy safeguards to prevent abuse, that the agency or authority making the request meets a threshold of "grounds to suspect" in order to request the preservation of computer data.

⁵⁴ Subparagraph 20(3) includes the required content of requests outlined at Paragraph 4 of the RHS as well as a statement regarding the intention to make a subsequent request to obtain the preserved data. In addition, in order to ensure that there is a proper balance between the ability of law enforcement to conduct effective investigations, and the protection of the reasonable expectations of privacy of individuals, it is important to clearly describe and delineate the data being sought pursuant to a given preservation request. Therefore, subparagraph 20(3) also ensures that the telecommunications address belonging to the individual whose data is to be preserved, as well as the identity of that individual (if known) be included in the request for preservation, along with the description of the computer data sought.

- (7) Where the requesting country submits a request for assistance to obtain the preserved computer data to the requested country's Central Authority before the expiry of that period, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.⁵⁵

Part V

Interception Of Telecommunications And Covert Electronic Surveillance

Paragraph 22: Scope Of This Part⁵⁶

- (1) Save in the case of a request falling within paragraph 27, a request for assistance falling within this Part may only be made if it appears to the requesting country that there are grounds to suspect that the information obtained pursuant to this Part will contain information relevant to the commission of a criminal offence in the requesting country.
- (2) A request for assistance falling within paragraphs 23, 25 and 26 of this Part may only be made where:
- (a) the criminal matter arising in the requesting country is, in the view of the requesting country, of a serious character;⁵⁷ and
 - (b) it appears to the requested country that there are grounds to suspect that the information obtained pursuant to this Part will contain information relevant to the commission of a criminal offence in the requested country.⁵⁸
- (3) Investigative activities undertaken pursuant to paragraphs 23, 25 and 26 of this Part shall take place insofar as they are permissible under the domestic law of the requested country and the duration of such activities, the detailed conditions, and the monitoring and preserving of the product of such activities, where applicable, shall be agreed between the requesting and requested countries.⁵⁹

55 Subparagraph 20(4) aims to clarify the procedure at various stages of the process envisaged by this provision.

56 Part V of the RUS reflects the need for the mutual legal assistance regime to effectively respond to current forms and manifestations of transnational crime, including terrorism, and the inextricable linkages to technological innovations. The provisions are largely inspired from the European Union Convention and the Council of Europe Convention on Cyber Crime. Nevertheless, the proposed provisions are envisaged to be of a flexible and enabling nature, in keeping with the overall character of the Scheme. Thus, countries are encouraged, to the extent permitted by their domestic law, to take such measures as may be necessary, to allow for the appropriate use by their law enforcement agencies of the types of assistance contemplated within their jurisdictions and to allow for the admissibility in Court, of evidence derived therefrom. Note that subparagraph 7(3)(e) provides that the costs of interception of telecommunications are to be met by the requesting country.

57 This provision reflects the intention of countries that assistance in the interception of communications, which may be intrusive and resource-intensive, should only be requested in relation to the most serious criminal offences. Subparagraph 21(1)(a) avoids being prescriptive as to the offences that are to be regarded as of a serious character, but instead accords flexibility to the requesting country to determine in accordance with its domestic law which offences are to be regarded as being of serious character.

58 Subparagraph 21(2)(b) reflects the policy direction of Senior Officials at their Meeting in October 2010.

59 Subparagraph 21(3) contains important guidance and limitations with respect to carrying out the type of assistance covered under Part V. Moreover, it is noted that such activities need not be "in accordance" with the procedures of the requested country. It will suffice that compliance with the request does not contravene the laws of the requested country.

- (4) Without prejudice to the general grounds of refusal in Part II of this Scheme, the requested country may refuse a request for assistance under this Part and shall be under no obligation to inform the requesting country of the reasons for such refusal.⁶⁰

Paragraph 23: Interception Of Telecommunications

- (1) A request under this Part may seek assistance for the interception of telecommunications.
- (2) A request under this Part may be made where the subject of the interception is in the requested country, and the requesting country needs the assistance of the requested country to effect or facilitate the interception of the subject's telecommunications.
- (3) A request under this Part may also be made where the subject of the interception of telecommunications is in the requesting country and the requesting country needs the assistance of the requested country to effect or facilitate the interception of the subject's telecommunications.
- (4) In addition to the information required by paragraph 4 of this Scheme, a request under this paragraph shall include:
 - (a) details of any provision of law under which an interception order or warrant for the interception of telecommunications is required in the requesting state and any provision of law which ensures respect for the rights of those whose telecommunications are intercepted;
 - (b) a copy of any related order or warrant obtained, if any;
 - (c) information for the purpose of identifying the subject of the requested interception;
 - (d) information as to the location of the subject;
 - (e) the desired duration of the interception;
 - (f) if possible, the provision of sufficient technical data, in particular the relevant network connection number, telecommunications address or service identifier, to ensure that the request can be executed;
 - (g) the type of telecommunications proposed to be intercepted; and
 - (h) the requesting country's preference as to the form of assistance to be provided by the requested country, being either
 - (i) the interception and immediate transmission to the requesting country of telecommunications; or
 - (j) the interception, recording and subsequent transmission to the requesting country of telecommunications.
- (5) Notwithstanding any preference expressed by the requesting country under subparagraph (4)(h) above, the requested country may comply with a request for assistance under this paragraph by either means.

⁶⁰ Subparagraph 21(4) provides the requested country with a broad and general discretion to refuse requests under Part V. It follows that a request under Part V may be refused where the requested country would not carry out the measure proposed in the request in relation to the criminal matter if it arose in its jurisdiction, for any number of reasons, including in the circumstances where the requested country is of the view that the criminal matter is not considered to be of a serious character under its domestic law.

Paragraph 24: Interception Of Transmission Data

- (1) A request under this paragraph may seek assistance for the interception of transmission data.
- (2) In addition to the information required by paragraph 4 of this Scheme, a request for the interception of transmission data shall include:⁶¹
 - (a) the identity of the agency or authority making the request;
 - (b) confirmation that an investigation is underway, and that the information requested will be relevant to that investigation;
 - (c) a brief description of the conduct under investigation;
 - (d) the telecommunication address of the individual whose transmission data is to be intercepted and, when known, his or her identity;
 - (e) a description of the transmission data to be intercepted and its relevance to the investigation or prosecution;
 - (f) the type of telecommunications proposed to be intercepted; and
 - (g) the desired duration of the interception.

Paragraph 25: Disclosure Of Intercept Material

- (1) A request under this Scheme may seek assistance for the disclosure of intercept material to the requesting country.
- (2) In addition to the information required by paragraph 4, a request under this paragraph shall include:⁶²
 - (a) confirmation that an investigation is underway, and that the information requested will be relevant to the investigation;
 - (b) information for the purpose of identifying the requested intercept material;
 - (c) the time period for which intercept material is sought;
 - (d) a request for confirmation as to whether or not the intercept material has been edited;⁶³ and
 - (e) a request for a copy of any order or warrant obtained in order to permit the interception, if any.
- (3) Each country is encouraged to adopt such provisions as may be necessary to enable it to comply with such a request.

Paragraph 26: Covert Electronic Surveillance

- (1) A request under this Scheme may seek assistance for covert electronic surveillance.

61 Subparagraph 24(3) specifies the technical and other information required to ensure that an interception of transmission data can be carried out. It also requires certain information with a view to ensuring that the privacy rights of the subjects of the interception of transmission data are appropriately protected.

62 Subparagraph 25(2) was inserted to address some of the privacy concerns associated with the sharing of intercept material.

63 Subparagraph 25(2)(d) is intended to cover situations where the intercept material may have been stored in an edited, processed or altered form such as summaries/gists of audio or visual product, still images, printouts of written messages, or transmission data relating to the communication.

- (2) In addition to the information required by paragraph 4 of this Scheme, a request under this paragraph shall include:
- (a) details of any provision of law under which an order or warrant for covert electronic surveillance is required in the requesting state and any provision of law which ensures respect for the rights of those under covert electronic surveillance.⁶⁴
 - (b) a copy of any related order or warrant obtained, if any;
 - (c) information for the purpose of identifying the subject and location of the requested covert electronic surveillance; and
 - (d) the desired times and duration of the covert electronic surveillance.

Paragraph 28: Subscriber Information⁶⁵

- (1) A request for the provision of subscriber information under this paragraph in connection with a criminal matter may be made by an agency or authority competent to make such a request under the laws of the requesting country and may be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.
- (2) In addition to the information required by paragraph 4, a request under this paragraph shall include:⁶⁶
- (a) the identity of the agency or authority making the request;
 - (b) confirmation that it relates to a duty or function of the agency or authority making the request;
 - (c) information for the purpose of locating the requested subscriber information;
 - (d) one of the name, address, telephone number, e-mail address, Internet Protocol address or any similar identifier associated with the subscriber whose information is sought under this Paragraph; and
 - (e) details of the subscriber information requested.
- (3) Each country is encouraged to adopt such provisions as may be necessary to enable it to comply with such a request.

64 It is important to note that the information regarding the laws of the requesting country must be provided, even when no warrant or order would be obtained under the circumstances (for instance, in countries where such a process would not be required for the purposes of making a request under the Scheme).

65 Subparagraph 27(1) sets out the purpose of the paragraph as a whole, in a manner consistent with that of other paragraphs under this Part. It is important to note that there is no need to involve Central Authorities in making a request for subscriber information given that such information is usually required quickly.

66 Subparagraph 27(2) sets out the requirements for making a request for subscriber information. In particular, subparagraph 27(2)(d) requires the requesting country to provide at least one piece of subscriber information (such as name, or Internet Protocol address) in order to obtain any of the other information available under the paragraph.

Part VI

Asset Recovery⁶⁷

Paragraph 29: Forfeiture And Confiscation

- (1) A request under this Scheme may seek assistance in the identification, tracing, restraining, freezing, seizure, forfeiture and confiscation of proceeds and instrumentalities of crime believed to be within the requested country.⁶⁸
- (2) In addition to the information required by paragraph 4, a request for assistance under subparagraph (1) shall also include:
 - a) details of the property in relation to which assistance is sought, including, where known, the estimated value of the property;
 - b) the location of the property;
 - c) the link between the property and any offence in respect of which the request is made;
 - d) details of any third party interests in the property and any notification provided to the third party by the requesting country; and
 - e) a certified copy of the relevant court order or decision.
- (3) Each country is encouraged to take such measures as may be necessary to:
 - (a) freeze, restrain or seize property upon receipt of a freezing, restraint or seizure order issued by a court of a requesting country;
 - (b) freeze, restrain or seize property upon receipt of a request that provides a basis for the requested country to believe that there are reasonable grounds for taking such actions and that the property would eventually be subject to an order of confiscation or forfeiture; and
 - (c) preserve property for confiscation or forfeiture.
- (4) Each country is encouraged to take such measures as may be necessary to:
 - (a) give effect to an order of confiscation or forfeiture issued by a court of a requesting country; and
 - (b) allow confiscation or forfeiture of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases as provided by domestic law.

⁶⁷ Part VI enables co-operation in all aspects of asset recovery arising out of criminal proceedings and extends the scope of the provision dealing with tracing, restraining and confiscating (etc) the proceeds of crime contained in paragraphs 28 – 30 of the HS.

⁶⁸ The assets in question must constitute the proceeds or instrumentalities of crime. It is important to note that "proceeds of crime" include any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission; and 'instrumentalities of crime' means any property used, or intended to be used, in connection with the commission of an offence. Although the assets in question must therefore be connected with a criminal offence, there is no requirement that any proceedings in the requesting country for restraint or confiscation should be criminal: the paragraph is intended to cover civil forfeiture proceedings. Nor is there any requirement that the requesting country should have secured a criminal conviction or instituted criminal proceedings against the subject of the request, or that the subject of the request should be the offender (although the rights of bona fide third parties are protected). Similar to the HS, the provision permits both recognition and enforcement of orders made in the requesting country and the making of orders in the requested country (whether or not there is any order in the requesting country).

- (5) Before lifting any measures taken pursuant to subparagraph (3), the requested country shall, wherever possible, give the requesting country an opportunity to present its reasons in favour of continuing the measure.
- (6) Nothing in this paragraph shall prejudice the rights of *bona fide* third parties, including countries.⁶⁹

Paragraph 30: Return And Disposal Of Property

- (1) Countries are encouraged to conclude agreements for the final disposal of confiscated or forfeited property.⁷⁰
- (2) Countries shall give due consideration to:
 - (a) returning confiscated or forfeited property or the value thereof to the requesting country;
 - (b) returning such property to its legitimate owners; and
 - (c) compensating the victims of the crime.
- (3) The requested country may deduct reasonable expenses incurred in the return or disposal of confiscated or forfeited property pursuant to this paragraph.⁷¹
- (4) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim restraint or seizure as a result of a request therefor may be released from the effects of such restraint or seizure.⁷²

Part VII

Miscellaneous Provisions⁷³

Paragraph 31: Transmission And Return Of Documents, Records, Items Or Other Material

- (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record, item or other material relevant to a criminal matter, the requested country may:

69 It is a matter for the domestic law of countries to provide appropriate safeguards. Provisions in the HS identifying possible domestic safeguards have been removed, it being felt that most member countries now have well-developed statutory regimes in relation to asset recovery so that such guidance is no longer necessary. *Bona fide* third parties may include countries which have an interest in the assets to be confiscated or forfeited, for example because they would also have a right to bring proceedings for confiscation. This provision is drafted to ensure the flexibility for countries, while reflecting the concerns addressed in other international instruments in this regard, such as Article 53(c) of the United Nations Convention against Corruption.

70 This provision is to be read together with Paragraph 6 above, which provides that the law of the requested country governs the execution of any request. However, it also encourages countries to reach agreement as to the disposal of confiscated or forfeited property on a multilateral, bilateral or case by case basis as seems appropriate to them, and in taking into account the interests of those involved.

71 Subparagraph 30 (3) deals with reasonable expenses incurred in the return or disposal of confiscated assets, such as costs associated with storage, administration or realisation of confiscated assets. A country would not normally deduct the cost of a domestic investigation or prosecution from assets returned to a foreign country and as a matter of international practice costs of judicial proceedings relating to the execution of mutual assistance requests are borne by the requested party.

72 This paragraph reproduces paragraph 30 (2) of the HS and deals specifically with the issue of release of seized property and the law applicable for that purpose.

73 Part VII reproduces paragraphs 10, 11, 12 and 23 of the HS. It is noted that the provisions relating to authentication under paragraph 24 of the HS are removed on the basis that this is a matter best dealt with under the domestic law of the requested country, which, in any case, governs the execution of requests under the scheme.

- (a) postpone the transmission of such material, where the material is required in connection with proceedings in the requested country, and in such a case, the requested country shall, where appropriate, provide a certified copy of the material, pending transmission of the original; or
 - (b) require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.
- (2) The requested country shall, as appropriate, authenticate any document, record, item or other material that is to be transmitted by that country.
 - (3) Where any document, record, item or other material is transmitted to the requesting country, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless the requested country has indicated that its return is not necessary.⁷⁴

Paragraph 32: Confidentiality And Limitation On Use Of Information And Evidence⁷⁵

- (1) The requested country shall keep confidential any information which might indicate that a request has been made or responded to.
- (2) If the request cannot be executed without breaching confidentiality, the requested country shall so inform the requesting country, which shall then determine whether and the extent to which it wishes the request to be executed.
- (3) The requesting country shall not use or disclose any information or evidence obtained under this Scheme for any purpose, other than for the proceedings stated in the request, without the prior consent of the requested country.
- (4) The requesting country shall comply with any other limitations imposed by the requested country on the use or transmission of the information or evidence provided.
- (5) Unless otherwise indicated by the requested country, when executing the request, information or evidence the contents of which have been disclosed in a public judicial hearing related to the request, may thereafter be used for any purpose.

74 This provision reflects the general principle that the documents, records, items or other material are the property of the requested country and ought rightfully to be returned, unless otherwise stated. However, it is open to Central Authorities to agree to an alternative arrangement between them.

75 Paragraph 32 of the RHS combines paragraphs 11 and 12 of the HS, dealing with confidentiality and the limitation on the use of information or evidence. There is an obvious need for confidentiality in dealing with requests for assistance under the Scheme. Where proceedings have not been commenced, disclosure of the making of a request or of the material supplied in response to it could be prejudicial to either the prosecution agency or the prospective defendant or both. Where proceedings are already underway, similar considerations apply and there is an added danger of interference with the judicial process.

A related safeguard is that the information or evidence obtained by the requesting country may only be used in connection with a matter other than the criminal matter specified in the request with the prior consent of the Central Authority of the requested country. The effect is that while disclosure in criminal proceedings is permitted, that permission is limited to proceedings concerning the criminal matter specified in the request itself. Where the evidence provided reveals the existence of further matters in respect of which criminal proceedings are taken, its use in those proceedings requires the consent of the requested country. This provision serves to protect, inter alia, the 'political offences' exception.

Paragraph 33: Consultation

The requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.⁷⁶

Paragraph 34: Scheme Not To Cover Arrest Or Extradition

Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

⁷⁶ The Scheme will depend for its success on the level of co-operation between Commonwealth governments in ensuring the enactment of appropriate implementing legislation and between Central Authorities in operating its provisions. Paragraph 33 of the RHS, like its equivalent provision in the HS, underlines this principle by referring to a duty to engage in prompt consultations at the request of another country in relation to matters arising under the Scheme; this should ensure that difficulties are promptly resolved and misunderstandings cleared up.

Scheme for the Transfer of Convicted Offenders Within the Commonwealth

Including amendments made by Law Ministers in April 1990

General Principles

1. A person convicted and sentenced to a term of imprisonment in one country ("the sentencing country") for an offence may be transferred, in accordance with the provisions of this scheme, to another country ("the administering country") in order that he may serve the remainder of that sentence in that other country.

Definitions

2. For the purposes of this Scheme -
 - (a) each of the following is a separate country, that is to say -
 - (i) each sovereign and independent country within the Commonwealth, together with any dependent territories which that country designates, and
 - (ii) each country within the Commonwealth which, although not sovereign and independent, is not designated for the purposes of the preceding subparagraph;
 - (b) (i) "administering country" means the country to which the convicted offender" may be, or has been, transferred in order to serve his sentence;
 - (ii) "convicted offender" means a person upon whom a sentence has been imposed.
 - (iii) "judgement" means a decision or order of a court or tribunal imposing a sentence;
 - (iv) "sentence" means any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate period of time in the exercise of its criminal jurisdiction;
 - (v) "sentencing country" means the country in which the sentence was imposed on the convicted offender who may be, or has been, transferred.

Transfer Of Convicted Offender

3. (1) A convicted offender to whom this Scheme may apply shall be informed by the sentencing country of the substance of the Scheme.

- (2) A convicted offender may only be transferred following a request by either the sentencing country or the administering country, but the convicted offender may apply for transfer.
- (3) When a convicted offender applies for his transfer, the country which receives that application shall, as soon as practicable, so inform the other country.

Conditions For Transfer

4. (1) A convicted offender may be transferred under the Scheme only on the following conditions
 - (a) if that person -
 - (i) is a national of the administering country, notwithstanding that he may also be a national of any other country, including the sentencing country, or
 - (ii) has close ties with the administering country of a kind that may be recognised by that country for the purposes of this Scheme; and
 - (b) if the judgment is final; and
 - (c) if at the time of receipt of the request for transfer, the convicted offender still has at least six months of the sentence to serve or if the sentence is indeterminate; and
 - (d) if the transfer is consented to by the convicted offender or, where in view of his age or his physical or mental condition one of the two countries considers it necessary, by a person entitled to act on behalf of the convicted offender; and
 - (e) if the sentencing and administering countries agree to the transfer.
- (2) In exceptional cases it is open to the sentencing and administering countries to agree to a transfer even if the time to be served by the sentenced person is less than that specified in subparagraph (1)(c).
- (3) A country may, at any time, define as far as it is concerned the term "national" for the purposes of this Scheme.

Obligations To Furnish Information

5. (1) For the purposes of enabling a decision to be made on a request or an application under this Scheme, the sentencing country shall send the following information and documents to the administering country, unless either country has already decided that it will not agreed to the transfer -
 - (a) the name, date and place of birth of the convicted offender;
 - (b) his address, if any, in the administering country;
 - (c) a certified copy of the judgment and a copy or account of the law on which it is based;
 - (d) a statement of the facts upon which the conviction and sentence were based;
 - (e) the nature, duration and date of commencement of the sentence;

- (f) whenever appropriate, any medical or social reports on the convicted offender, information about his treatment in the sentencing country and any recommendation for his further treatment in the administering country; and
 - (g) any other information which the administering country may specify as required in all cases to enable it to consider the possibility of transfer and to enable it to inform the prisoner and the sentencing country of the full consequences of transfer for the prisoner under its law.
- (2) The administering country, if requested by the sentencing country, shall send to it a document or statement indicating whether the convicted offender satisfies the requirements of paragraph 4(1)(a).

Requests And Replies

6. (1) Requests and applications for transfer and replies shall be made in writing.
- (2) Communications between sentencing and administering countries shall be conducted through the channels notified in pursuance of paragraph 19.

Supporting Documents

7. Except as provided in paragraph 5(1)(c), documents sent in accordance with this Scheme need not be certified.

Consent And Its Verification

8. (1) The sentencing country shall ensure that the person required to give consent to the transfer in accordance with paragraph 4(1)(d) does so voluntarily and in writing with full knowledge of the legal consequences thereof. The procedure for such consent shall be governed by the law of the sentencing country.
- (2) The sentencing country shall afford an opportunity to the administering country to verify that the consent is given in accordance with the conditions set out in subparagraph (1).

Notification Of Decisions

9. A convicted offender shall be informed, in writing, of any action taken by the sentencing country or the administering country, as well as of any decision taken by either country, on a request for his transfer.

Effect Of Transfer For Sentencing Country

10. The enforcement of the sentence by the administering country shall, to the extent that it has been enforced, have the effect of discharging that sentence in the sentencing country.

Effect Of Transfer For Administering Country

11. (1) The competent authorities of the administering country shall continue the enforcement of the sentence immediately or through a court or administrative order under the conditions set out in paragraph 12.

- (2) Subject to the provisions of paragraph 13, the enforcement of the sentence shall be governed by the law of the administering country and that country alone shall be competent to take all appropriate decisions.
- (3) Any country which, according to its national law cannot avail itself of the procedure referred to in subparagraph (1) to enforce measures imposed in another country on a person who, for reasons of mental condition, has been held not criminally responsible for the commission of an offence, and which is prepared to receive such a person for further treatment, may indicate the procedure it will follow in such a case.

Continued Enforcement

12. (1) The administering country shall be bound by the legal nature and duration of the sentence as determined by the sentencing country.
- (2) If, however, the sentence is by its nature or duration incompatible with the law of the administering country, or its law so requires, that country may, by court or administrative order, adapt the sanction to a punishment or measure prescribed by its own law. As to its nature the punishment or measure shall, as far as possible, correspond with that imposed by the judgment of the sentencing country. It shall not aggravate, by its nature or duration, the sanctions imposed in the sentencing country.

Pardon, Amnesty, Commutation, Review

13. (1) Unless the sentencing and the administering countries otherwise agree the sentencing country alone may grant pardon, amnesty or commutation of the sentence in accordance with its constitution or other laws.
- (2) The sentencing country alone may decide on any application for review of the judgment.

Termination Of Enforcement

14. The administering country shall terminate enforcement of the sentence as soon as it is informed by the sentencing country of any decision or measure as a result of which the sentence ceases to be enforceable.

Information On Enforcement

15. (1) The administering country shall notify the sentencing country -
 - (a) when it considers enforcement of the sentence to have been completed; or
 - (b) if the convicted offender escapes from custody before enforcement of the sentence has been completed.
- (2) The sentencing country may, at any time, request a special report from the administering country concerning the enforcement of the sentence.

Transit

16. Each country shall afford reasonable co-operation in facilitating the transit through its territory of convicted offenders who are being transferred between other countries pursuant to this Scheme. Advance notice of such transit shall be given by the country intending to make the transfer.

Costs

17. The cost of the transfer of a convicted offender shall be defrayed by the sentencing country and the administering country in such proportions as they may agree either generally or in regard to any particular transfer.

Temporal Application

18. The Scheme shall be applicable to the enforcement of sentences imposed before as well as after its adoption.

Acceptance Of Scheme

19. Any country which enacts legislation to give effect to this Scheme shall notify the Commonwealth Secretary-General of that fact and shall inform him of the proper channel for communication and deposit with him a copy of the legislation.

Framework for the Commonwealth Network of Contact Persons (CNCP)

Principles of the CNCP

The purpose of the Commonwealth Network of Contact Persons will be:

1. To facilitate international cooperation in criminal cases between Commonwealth member states, including mutual legal assistance and extradition;
2. To provide legal and practical information necessary to the authorities in their own country and Commonwealth member states wishing to invoke international cooperation; and
3. To facilitate the preservation of res, as appropriate and to the extent permissible by domestic legislation pending a formal request.

The Commonwealth Network of Contact Persons will be an informal network. The Contact Person does not act as the Central Authority of a member state unless the Central Authority also acts as Contact Person. The role of the Central Authority under the Harare Scheme on Mutual Assistance in Criminal Matters remains unaffected by the establishment of the CNCP.

Article 1– Establishment

The Commonwealth Network of Contact Persons, hereinafter referred to as the Network or CNCP, which may include prosecutors and other authorities with responsibility in facilitating requests in criminal matters, shall be established in the Commonwealth.

It will be for each member state, taking into account their own constitutional rules, legal traditions and internal structure, to nominate a Contact Person(s).

The Contact Person(s) shall include a person occupying a certain office in the Central Authority and/or Competent Authority, if the member state so chooses.

Article 2 – Objective

The objective of the CNCP is to improve and enhance international assistance and cooperation in criminal cases.

Article 3 – Composition

1. The CNCP shall comprise at least one Contact Person from each of the jurisdictions of the Commonwealth.
2. The Commonwealth Secretariat shall designate one of its officials to coordinate the activities of the CNCP.

Article 4 – Functions of the Network

The CNCP shall, in particular:

- (c) Facilitate the establishment of appropriate contact between Contact Persons in the various jurisdictions of the Commonwealth in order to carry out the functions laid down in Article 5;
- (d) Meet periodically, as arranged by the Commonwealth Secretariat, to review activities; and
- (e) Make every effort to collaborate with other networks.

Article 5 – Functions of the Contact Persons

1. The Contact Persons shall seek, to the extent permitted by their domestic laws, to facilitate international cooperation in criminal matters between member states of the Commonwealth. They shall enable the most appropriate direct contact between prosecution agencies, other competent authorities and Contact Persons in Commonwealth jurisdictions. They may, if necessary, travel to meet other Contact Persons, on the basis of an agreement between the administrations concerned.
2. The Contact Persons shall seek to provide legal and practical information to prosecution agencies, other competent authorities and Contact Persons in their own and other Commonwealth jurisdictions to improve international cooperation in criminal cases and assist other member states, in appropriate cases and to the extent permissible by domestic legislation, with interim measures to preserve the res.
3. They shall aim to improve coordination of international cooperation in criminal cases where a series of requests from a Commonwealth jurisdiction necessitates coordinated action in another Commonwealth jurisdiction.
4. Contact Persons, through the Commonwealth Secretariat, shall distribute any changes in legislation or procedure introduced within their jurisdiction.

Article 6 – Meetings

1. Contact Persons shall endeavour to meet periodically to review the activities of the CNCP.
2. The aims of the periodic meetings shall be as follows:
 - (a) to allow the Contact Persons to get to know each other and exchange experiences;
 - (b) to provide a forum for discussion of practical and legal problems encountered; and
 - (c) to provide to the Commonwealth Secretariat any information or collective opinions which may assist the Secretariat in its work.

Article 7 – Provision of Information

1. It will be the responsibility of each member state initially to provide the details of the Contact Person(s) to the Commonwealth Secretariat.

2. It shall be the responsibility of each Contact Person to check the accuracy of the data contained in the system and to inform the Commonwealth Secretariat immediately if any of these details need to be amended or updated.

Article 8 – Role of the Commonwealth Secretariat

Activities of the network should be coordinated by the Commonwealth Secretariat which shall, *inter alia*:

1. Maintain an up-to-date list of Contact Persons;
2. Maintain an up-to-date web page concerning the activities of the CNCP;
3. Facilitate meetings of Contact Persons; and
4. Disseminate information amongst Contact Persons.



The Commonwealth